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United States Government
Before The National Labor Relations Board

Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Healthcare Center	)	
and	)	**Cases 18-RC-16415** **18-RC-16416**
United Steelworkers of America, AFL-CIO/CLC	)	

Union's Brief In Opposition To Employer's Request for Review

Now Comes, the United Steelworkers of America, AFL-CIO/CLC ("Union" or "USWA") and does hereby urge the Board to deny the Request for Review filed by Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Healthcare Center ("Employer" or "Beverly") for the following reasons.

Introduction

By decision dated October 2, 2001, the U.S. Court of Appeals for the Eighth Circuit remanded the instant case to the Board. *Beverly Enterprises v. NLRB*, 266 F.3d 786 (8th Cir. 2001). In particular, the Eighth Circuit remanded this case "to afford the Board the opportunity to reconsider its decision" to include the employer's RNS and LPNs in the bargaining unit in light of the Supreme Court's decision in *NLRB v. Kentucky River Community Care, Inc.* (*"Kentucky River"*), 532 U.S. 706 (2001). *Id.* at 789.

In its Supplemental Decision of August 20, 2002, the NLRB, Region 18, upon remand, concluded that the inclusion of the RNS and LPNs in the bargaining unit is in complete accord with the *Kentucky River* decision. To wit, the Region concluded that while these employees,

when acting as charge nurses, have some authority to direct the tasks, assignments and schedules of the CNAs, "the judgments of the charge nurses are so circumscribed by existing policies, orders and regulations of the Employer that they do not exercise independent judgment within the meaning of Section 2(11)." (Sup. Dec. at p. 4). As we demonstrate below, this decision is supported by the record and is in keeping with *Kentucky River,* in which the Supreme Court affirmed the Board's authority to find that "the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." 532 U.S. at 713-714.

Argument

I. The Supreme Court's Allocation of The Burden of Proof Supports The Region's Decision

The Supreme Court dealt with two limited issues in *Kentucky River*. First, the Supreme Court treated with the question of which party has the burden of proving supervisory status in a case, such as the instant one, in which an employer attempts to exclude employees from a bargaining unit on the basis that they are supervisors. *Kentucky River*, 532 U.S. at 710-712. The Supreme Court answered this question by holding, just as the Board has for many years and as the Region did in this case, that *the employer bears this burden.* Id. at 711-712. This is important, for the record in this case is scant, and at times utterly silent, on a number of issues significant to deciding the supervisory status issue. And, to the extent this is so, this only serves to support the Region's Decision.

For example, Beverly has utterly failed to even establish how many of the 20 nurses at issue in this case have ever served as the highest-ranking employee on a shift, i.e., as a charge

nurse. In other words, while Beverly rests its case largely on "the role of the RN as the top person in the buildings on evenings and weekends" (Request for Review at p. 11), Beverly has not established how many of the nurses it is attempting to exclude actually serve in the capacity as "charge nurses" or how often. Similarly, Beverly has never attempted to identify which particular nurses serve in such a capacity. Because Beverly bears the burden on this threshold issue, the record's silence on this issue supports the Region's decision.

In addition, as the Region emphasized in its Supplemental decision, the record also fails to demonstrate that the charge nurses exercise any more authority over employees than usual. (Sup. Dec. at p. 6). Thus, while the Employer tries to claim in its Request for Review at p. 11 that the Region somehow "failed to recognize that the role of the RN as the top person in the building on evening and weekends . . . establishes supervisory status," the Region in fact concluded, based upon the record, that the Employer failed to shoulder its burden on this score. As the Region explained, "[t]here is no evidence that the night and weekend charge RNS have any different duties or responsibilities than they have at other times." (Sup. Dec. at p. 6).

To the contrary, as the Region explained, the evidence that there is on this subject demonstrates that the charge nurses in fact rely heavily upon statutory supervisors, which remain on call during the evenings and weekends, in order to make decisions as to how to direct CNAs (Tr. 25, 182-183, 235-236, 312-313). As the Region concluded, "the evidence shows that the charge nurses do in fact routinely call the DON or ADON, or even the facility administrator, regarding issues such as staff shortages that the collectively-bargained 'mandate' procedure did not satisfy." (Sup. Dec., p. 6). As a result, the Region found "the record insufficient to establish that charge nurses exercise any greater independence nights or on weekends than they do

weekdays." *Id.*; *citing*, *Beverly Enterprises-Minnesota v. NLRB*, 148 F.3d 1042, 1048 (8th Cir. 1998) (the fact that charges nurses are highest ranking employee on evening and night shifts does not establish supervisory authority where stipulated supervisors are on call to consult with throughout these shifts); *accord*, *Ken-Crest Services*, 335 NLRB No. 63, slip op. at 3 fn. 16 (August 27, 2001) (citing *Beverly Enterprises-Minnesota, supra.*, with approval and holding that "nothing in the statutory definition of 'supervisor' implies that service as the highest ranking employee on site requires finding that such an employee must be a statutory supervisor."). It is the Employer which simply chooses to ignore this evidence as well as the prevailing law on this subject.

II. The Supreme Court Explicitly Endorsed The Analysis of "Independent Judgment" Relied Upon By The Region In This Case

The second issue which the Supreme Court decided in *Kentucky River* concerned the Board's determination of whether certain nurses exercised "independent judgment" in performing 1 of the 12 supervisory functions enumerated by Section 2(11) the Act -- i.e., the function of directing other employees' work. 532 U.S. at 713. Specifically, as the Supreme Court explained, it was called upon to analyze a Board decision in which "[t]he only basis asserted . . . for rejecting respondent's proof of supervisory status with respect to directing patient care was . . . that employees do not use 'independent judgment' when they exercise 'ordinary professional or technical judgment in directing less-skilled employees to deliver services . . .'" (*Id.*) (emphasis added).

While rejecting much of the Board's analysis in *Kentucky River*, the Supreme Court determined that the Board's analysis was proper in the one respect applicable to the Region's

decision in the instant case. To wit, the Supreme Court held that it is within the Board's authority to determine that an employee does not exercise "independent judgment" in directing other employees' work when that judgment is constrained by "employer-specified standards." 121 S.Ct. at 1867. Thus, the Supreme Court held,

> as reflected in the Board's phrase 'in accordance with employer-specified standards,' it is . . . undoubtedly true that the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer. So, for example, in *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995), the Board concluded that 'although the contested licensed officers are imbued with a great deal of responsibility, their use of independent judgment and discretion is circumscribed by the master's standing orders, and the Operating Regulations, which require the watch officer to contact a superior officer when anything unusual occurs or when problems occur.'

532 U.S. at 713-714 (emphasis added).

The Supreme Court's decision in *Kentucky River* supports the analysis of the Regional Director in this case who correctly found that the discretion of the RNS and LPNs to direct the CNAs is significantly limited by the standards, schedules, regulations and orders set by management (*See*, Transcript ("Tr.") at ps. 26-27, 200, 231-232, 552). *See also*, *Beverly Enterprises - Pennsylvania*, 335 NLRB No. 54, slip op. at ps. 1-2, fn. 3 & ps. 35-37 (August 27, 2001) (Board concluding that "the LPNs exercised only 'routine' authority that did not require the use of independent judgment in directing the work of other employees within the meaning of Section 2(11)."). In addition, as the Regional Director concluded, their discretion is limited by the procedures set forth in the labor agreement between the CNAs and Beverly (Tr. 70; Employer Ex. 32). The limiting force of this labor agreement makes this a uniquely strong case for finding

that the RNS and LPNs are not "supervisors" under the Act.

Thus, the Region in the instant case explained that the ability of the RNS and LPNs to schedule CNAs is greatly circumscribed by the shift schedule which is determined by the collective-bargaining agreement between the CNAs and Beverly (Sup. Dec. at p. 5). As the Regional Director explains, "[w]ho works which shift and where they work as to floor and a specific suite of rooms, are initially set by that schedule, pursuant to a bidding procedure established by the CNAs' collective bargaining agreement." (*Id.*). Moreover, the Regional Director explained, "[i]f someone fails to show up for a scheduled assignment, the charge nurse follows a collectively-bargained procedure for finding a replacement" -- i.e., they must look for a replacement by seniority (*Id.; see*, CNA labor agreement (Employer Ex. 32) at p. 13). And, contrary to the disingenuous claims of Beverly (Request for Review at ps. 5, 11), this "collectively-bargained procedure for finding a replacement" does not permit the RNS or LPNs to require (or "mandate") off-duty CNAs to come in to work to fill in a staffing shortage. Indeed, Beverly's own witness, DON Kepler, admitted that charge nurses may only request off-duty CNAs to fill a particular shift and that the CNAs are free to decline such requests (Tr. 206-207, 219, 490; *see also*, CNA labor agreement (Employer Ex. 32) at p. 13).

The inability to require off-duty employees to fill in for staffing shortages was one of the key facts the Eighth Circuit relied upon for finding that the charge nurses of the same Employer in this case (but at another Minnesota location) were not "supervisors" under the Act. *See, Beverly Enterprises -- Minnesota, supra.*, 148 F.3d at 1047; *accord, Franklin Home Health Agency*, 337 NLRB No. 132, slip op. at 5 (July 19, 2002) ("nurses reliance on volunteers and lack of authority to compel overtime work underlined the absence of supervisory power.").

Indeed, the facts here presents an even stronger case than *Beverly Enterprises, supra.*, for finding that the RNS and LPNs are not "supervisors" in that the CNA labor agreement requires them to attempt to fill in for staff shortages by seniority. Such was not true in *Beverly Enterprises*, 148 F.3d at 1047, where the court noted that there were "no established guidelines . . . to aid nurses in determining which off-duty [nursing assistants] to contact, leaving the matter to the nurses' complete discretion."

In the same vein, the Region determined there is "no evidence that charge nurses exercise independent judgment in releasing employees early from a scheduled shift or getting them to stay over" in that "[t]he number of employees appears to be dictated by the schedule and the census, and the identity of affected employees is determined by volunteers or the collectively-bargained procedure." (Sup. Dec. at p. 5). Moreover, as the Regional Director concluded, it is undisputed that the RNS and CNAs have been told by the Employer that "they are not to 'approve' any requests to leave early, but are to simply allow the employee[s] to go at their own discretion if they feel they have to, and leave it up to Marchetti [the assistant director of nursing] later to decide whether to excuse or punish the absence." (*Id.*; Tr. 225, 314). Again, the Employer in this case attempts to prevail by simply ignoring this undisputed record evidence (Request for Review at p. 5).

In addition, the Regional Director concluded that the record does not support the Employer's claim, which it also makes to the Board (Request for Review at p. 10 & fn. 7), that the RNS and LPNs use independent judgment in changing room and floor assignments (Sup. Dec. at p. 5). As the Regional Director explains,

> [a]lthough Employer witnesses testified conclusionarily that charge nurses make changes in room and floor assignments based on independent judgment of CNAs' skills and abilities, the charge nurses testified as to particular incidents in which they merely asked the CNAs to decide among themselves what each one would do when no-shows or changes in patient census caused imbalances in the work load. *The Employer's conclusionary testimony is insufficient to satisfy its burden of proof.*

(*Id.*). The Regional Director's conclusion in this regard is supported by the record (Tr. 316, 340-342), as well as the Supreme Court's decision in *Kentucky River* which affirmed the Board's long-standing holding that it is the employer which bears the burden of showing supervisory status in cases such as this one. In addition, this conclusion is in keeping with the recent decision of the Board in *Franklin Home Health Agency, supra.*, which upheld the Regional Director's conclusion that a nurse's "assignment of tasks in accordance with an Employer's set practice, pattern or parameters, or based on such obvious factors as whether an employee's workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition." 337 NLRB No. 132, slip op. at 5.

The Regional Director also concluded, again contrary to the claim of the Employer (Request for Review at p. 5), that "[r]egarding changes in time clock entries, there is no evidence [that] this is anything but rubberstamping corrections requested by the CNAs" and that "CNAs sometimes make their own corrections without needing a charge nurses's approval." (Sup. Dec. at p. 6). The Regional Director's conclusion that this changing of time clock entries is merely routine in nature and therefore does not rise to the level of "supervisory" authority is fully supported by the record (Tr. 76-78) as well as the Supreme Court's decision in *Kentucky River*, 532 U.S. at 713-714 (reaffirming, based on the text of Section 2(11), that the exercise of

authority which is "'of merely routine or clerical nature'" does not establish "supervisory" status). *See also, Beverly Enterprises - Pennsylvania*, 335 NLRB No. 54, slip op. at ps. 1-2, fn. 3 & ps. 35-37 (August 27, 2001) (Board concluding that employer failed to meet burden of showing supervisory status of LPNs where "the LPNs exercised only 'routine' authority that did not require the use of independent judgment in directing the work of other employees within the meaning of Section 2(11).").

Finally, the Supreme Court in *Kentucky River* reached a decision which simply does not apply to the instant case. To wit, the Supreme Court held that the Board may not permissibly reach the conclusion that

> the judgment even of employees who are permitted by their employer to exercise a sufficient *degree* of discretion to assign and direct is not 'independent judgment' if it is a particular *kind* of judgment, namely, 'ordinary professional or technical judgment in directing less-skilled employees to deliver services'

532 U.S. at 714 (Court's emphasis).

In the instant case, this Region properly concluded that the nurses -- by virtue of all the restrictions which Beverly places upon them through procedures, policies, postings and the CNA labor agreement -- do not, in the words of the Supreme Court, "exercise a sufficient *degree* of discretion to assign and direct" to be considered supervisors under the Act. The Region therefore had no occasion to, and therefore did not in fact, make any assessment about the *kind* of judgment the nurses exercised. As a result, the Supreme Court's holding on this point simply has no application here.

Conclusion

In light of the above, the Board should deny the Employer's Second Request for Review and adopt the Regional Director's Supplemental Decision as its own.

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CERTIFICATE OF SERVICE

I, Daniel M. Kovalik, do hereby certify that a true and correct copy of the foregoing Union's Brief In Opposition To Employer's Request For Review was served via U.S. mail, postage prepaid, on this 24th day of September, 2002, on the following:

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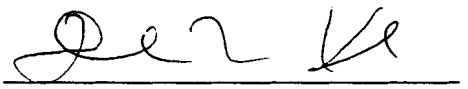

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